No. 89-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF

JAMES B. DANIELS, an Attorney-at-Law of the State of New Jersey,

Petitioner,

—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

*MORTON STAVIS
MAHLON F. PERKINS, JR.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6425

Counsel for Amicus Curiae

*Counsel of Record

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Center for Constitutional Rights respectfully moves this Court for leave to file the attached brief amicus curiae in support of the petition for certiorari. We have obtained the consent of the petitioner, and a letter of consent from his counsel has been forwarded to the Clerk of the Court under separate cover. We were unable to obtain the consent of the New Jersey Attorney General, representing the respondent Superior Court of the State of New Jersey.

The petition presents questions of great importance for defining the constitutional limitations on the summary contempt power. They arise in this case out of the summary contempt conviction of a New Jersey public defender for non-verbal facial expressions which the judge considered disrespectful. This conviction of

a lawyer for conduct which did not come close to obstructing the administration of justice flies in the face of ruling precedents of this Court, particularly In re McConnell, 370 U.S. 230 (1962), which capped a long history of efforts to check the unbridled exercise of the contempt power. Unfortunately, the petitioner's plight is not an isolated one. Herein lies the interest of the Center.

Founded twenty-four years ago as an outgrowth of the civil rights movement in the South, the Center provides legal support to individuals and groups whose constitutional rights have been infringed or denied. In our work we rely not only on our own staff attorneys but on a network of cooperating lawyers and law professors throughout the United States. We often defend persons who have been prosecuted for exercising their constitutional

rights. The causes we espouse are not always popular. Out of our own experience we know how important it is that a lawyer be free to defend his clients with vigor, even vehemence, without having to fear that he may be held in contempt if an excess of zeal leads him to overstep the bounds of courtroom propriety.

Because our own attorneys and cooperating attorneys have from time to time been held in contempt, we are sensitive to the dangers that an untrammeled contempt power presents for our own work and that of other public interest organizations which seek to defend and enlarge constitutional rights. Over the years we have successfully defended lawyers in a number of contempt cases, among them In the Matter of Pilsbury, 866 F.2d 22 (2nd Cir. 1989); United States v. Turner, 812 F.2d 1552 (11th Cir. 1987); In re Dellinger,

461 F.2d 389 (7th Cir. 1972); Matter of Hinds, 90 N.J. 604 (1982). We are currently representing a professor of law at the University of North Carolina in his appeal of a criminal contempt conviction in a North Carolina state court. In the Matter of Barry Nakell, North Carolina Court of Appeals, No. 89 GO 848. We are also consulted from time to time in other lawyer contempt cases. We have, for example, been requested to file an amicus brief in this Court in support of the petition in Lawrence Hochheiser v. United States of America, Docket No. 89-1991, and will be doing so in a few days.

This special experience has led us to conclude that the teachings of McConnell are being widely forgotten or ignored, with devastating consequences for the constitutional rights of lawyers and their clients. We respectfully suggest that out

of this experience we can contribute an extra dimension to this case that would help the Court to decide, as we believe it should, that the petition should be granted.

Respectfully submitted,

*MORTON STAVIS
MAHLON F. PERKINS, JR.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York NY 10012
(212) 614-6425
ATTORNEYS FOR AMICUS CURIAE

*Counsel of Record

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BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS

This brief amicus curiae is submitted in support of the petition for certiorari seeking review of the decision of the Supreme Court of New Jersey in In the Matter of James B. Daniels, 118 N.J. 51, 570 A.2d 416 (1990).

Interest of Amicus

The Center for Constitutional Rights, founded twenty-four years ago as an outgrowth of the civil rights movement in the South, provides legal support to individuals and groups whose constitutional rights have been infringed or denied. In our work we rely not only on our own staff attorneys but on a network of cooperating lawyers and law professors throughout the United States. We often defend persons who have been prosecuted for exercising their constitutional rights. The causes we espouse are not always popular. Out of

our own experience we know how important it is that a lawyer be free to defend his clients with vigor, even vehemence, without having to fear that he may be held in contempt if an excess of zeal leads him to overstep the bounds of courtroom propriety. We believe that this is a right protected by the United States Constitution, and that a judge may not summarily hold a lawyer in contempt for behavior, however unseemly, that does not obstruct the administration of justice. We file this brief because this case, as well as another case in which we are filing an amicus brief in support of a petition for certiorari, Lawrence Hochheiser v. United States of America, Docket No. 89-1991, clearly presents this constitutional issue.

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The petitioner, James B. Daniels, a New Jersey public defender, was summarily convicted of criminal contempt of court for non-verbal facial expressions which the trial judge considered disrespectful. Although his conduct did not obstruct, or imminently threaten to obstruct, the administration of justice, the New Jersey Supreme Court affirmed his conviction under the New Jersey contempt statute because it had the mere "capacity" to obstruct the administration of justice. This vague standard does not comport with the constitutional requirements for exercise of the summary contempt power as laid down by this Court in In re McConnell, 370 U.S. 230 (1962) and In re Little, 404 U.S. 553 (1972). Such a standard, which permits disrespect without more to be grounds

for contempt, puts a damper on fearless advocacy by attorneys and diminishes the Sixth Amendment rights of their clients.

We point out that the facts and circumstances of this case parallel those of other lawyer contempt cases in which the Center has been involved in representing or counseling attorneys held summarily in contempt. McConnell and Little are the culmination of a long historical struggle to limit the arbitrary power of judges to convict summarily without the ordinary due process safeguards. We fear that their teachings are now too often forgotten, and suggest that this petition and the petition in Hochheiser present an exceptional opportunity to reestablish needed limitations on the contempt power.

ARGUMENT

THE COURT SHOULD SEIZE THE OPPORTUNITY PRESENTED BY THIS PETITION TO REAFFIRM THE CONSTITUTIONAL LIMITATIONS ON THE POWER OF COURTS TO PUNISH SUMMARILY FOR CONTEMPT ATTORNEYS WHOSE CONDUCT HAS NOT ACTUALLY OBSTRUCTED THE ADMINISTRATION OF JUSTICE

1. The Circumstances of the Petitioner's Contempt Conviction

The petitioner, James B. Daniels, an attorney in the Office of the Public Defender who had been assigned to represent the defendant in a prosecution for first-degree robbery, was held in contempt during pretrial proceedings for facial grimaces in reaction to a ruling of the judge which he found incomprehensible. This happened on the second day of pretrial. During the first day he had fought unsuccessfully to mitigate the adverse impact of a stipulation which permitted the State to introduce evidence of a polygraph test that the defendant had failed and prohibited the defendant from introducing or

alluding to a prior polygraph that he had passed "with flying colors," and even prevented the defendant from putting on an expert to refute the State's expert. Faced with the dire consequences for his client, Daniels persisted in his efforts to have the stipulation voided or modified. His persistence plainly annoyed the judge, who came to court the next day armed with a definition of contempt from the opinion in a New Jersey case, State v. Vasky, 203 N.J. Super. 91 (App. Div.1985).

On the second day, after the jury was selected but before it was sworn, Daniels moved for a mistrial on the ground that the prosecution had misused its peremptory challenges. In rendering his decision, the judge noted the requirement that the motion be made prior to swearing the jury; although not satisfied that this requirement had been met, he began to rule on the

assumption the motion was timely. It was at this moment that the behavior occurred which the judge, interrupting himself, described as "you laughed, you rolled your head, you threw yourself back in your seat." He pronounced Daniels in contempt of court and said that he would release the jury. Daniels, permitted to speak before the judge passed sentence, responded in substance that he had shown no disrespect but reacted as a human being to his disappointment that every single decision had gone against him.[1] The judge

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[1] In a supplemental order, the trial judge elaborated upon his contemporaneous descriptions in the record of Daniels' behavior and found other instances of disrespect in his "inflections of voice and sarcastic manner of delivery." Affidavits submitted later by Daniels, the judge's clerk and the prosecutor agreed that the gestures for which Daniels was found in contempt were inaudible, and that his defense of his position, while vigorous, was conducted without exhibiting sarcasm or disrespect in manner or tone of voice.

forthwith sentenced him to serve two days in the County Jail, with immediate commitment, and to pay a $500 fine.[2]

No jurors or prospective jurors were present during any of these proceedings.

The facts demonstrate that the behavior for which Daniels stands contemned grew our of and cannot be considered apart from his stubborn efforts on behalf of his client. They indicate that his reactions to the judge's rulings, however improper and however offensive to the trial judge, were not calculated to disrupt the trial or otherwise to obstruct or imminently threaten to obstruct the administration of justice, and did not in fact do so. They

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[2] On appeal, the Appellate Division of the New Jersey Superior Court vacated the custodial portion of the sentence, noting that "the circumstances suggest that the harm visited upon the judicial system was not too severe." Pet. App. at 179a-180a.

clearly sprang from distress at his failure to sustain his client's position on issues crucial to his defense against serious criminal charges.[3]

In upholding the Appellate Division's affirmance of Daniels' conviction, the New Jersey Supreme Court did not find that Daniels had actually obstructed the orderly administration of justice. It was sufficient, as the court viewed it, that his conduct have "the capacity" to do so. Pet. App. at 28a. Adopting language from the dissent in the Appellate Division, it defined the standard as follows:

> In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority.

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[3] As the New Jersey Supreme Court expressed it: "We can well understand the mounting frustrations that this attorney had faced in confronting scientific evidence that he believed to be unreliable." Pet. App. 54a.

Id. at 49a. This standard is constitutionally defective.

2. The Parallels to Other Attorney Contempts

The Daniels contempt conviction presents features that are found in a number of other attorney contempt cases in which the Center has been involved.

Jeopardy of Client. The attorney is faced with an adverse ruling which imperils the cause of his client and which he believes to be erroneous as a matter of law or based on a misunderstanding of the facts. This leads him to exceed the bounds of decorum in his efforts to overcome the ruling, arousing the judge's ire.

Gross Blunder by the Court. Sometimes the court takes a position that appears so incomprehensible to the attorney that he involuntarily lets his amazement show in a manner that offends the judge. This

happened to Daniels when the judge addressed his motion for a mistrial, timely made before the jury was sworn, with the remark that he was not satisfied this requirement had been met.

Court's Perception of "Body Language." An overly sensitive judge reads into an attorney's demeanor, facial expression or tone of voice an intent to insult or mock the court, even where the content of the attorney's language has been uniformly respectful. The court dismisses any apology. Others present in the courtroom may have observed nothing offensive, but their testimony comes too late to affect a summary contempt finding.

Court's Bias Against Party. A feature present in a number of cases, although not apparent in Daniels' case, is the judge's antagonism to the attorney's client because of the nature of the offense with

which he is charged or the rights he is seeking to enforce. This antagonism may then be transferred to the attorney, a transfer that may readily occur when a rambunctious defendant engages in courtroom antics.

Disruption Caused by Court. The court proceedings are unnecessarily interrupted by a judge who takes umbrage at what he perceives to be disrespect by the attorney and orders his ejection from the courtroom or pronounces summary contempt. The attorney does not intend or foresee such an interference with the orderly administration of justice and should not be held accountable therefor. There was no need, indeed no excuse, in the case of Daniels for the judge to pack him straight off to jail and dismiss the jury.

We recognize that there have been instances when a lawyer has deliberately and

repeatedly provoked the court in order to gain the attention of the press or create grounds for a mistrial. Such behavior is plainly punishable as an obstruction to the administration of justice. Not so, conduct which erupts in the tense atmosphere of a trial where the attorney is simply doing his utmost to protect the interests of an endangered client.

3. Origins of the Constitutional Limitations on the Contempt Power

The contempt power of a federal court is limited by statute, in the case of conduct taking place before it, to "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401(1). This restriction is rooted in constitutional considerations that arose in the impeachment trial of James H. Peck, a federal district judge who had im-

prisoned a lawyer for publishing a criticism of one of his opinions in a case on appeal. Judge Peck was acquitted by a single vote after a trial that continued over a period of almost two months.[4] The day after his acquittal Congress took steps to provide for a drastic delimitation of the federal contempt power. Within a few days James Buchanan, the principal manager of the case against Peck (and afterwards elected President), brought in a bill that became the Act of March 2, 1831, 4 Stat. 487. This Act, "declaratory of the law concerning contempts of court," confined the summary contempt power, inter alia, to misbehavior "in the presence of said courts, or so near thereto as to obstruct the ad-

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[4] The trial is reported in full in Stansbury, Report of the Trial of James H. Peck on an Impeachment for High Misdemeanors in Office (1933).

ministration of justice," -- language almost identical with that now found in 18 U.S.C. § 401(1). See, Nye v. United States, 313 U.S. 33, 44-46 (1941).

The arguments by Buchanan and other managers of the case against Peck demonstrate that their passionate opposition to the broad contempt powers urged by those charged with Peck's defense sprang from their conviction that such powers contravened the principles for which the Revolution was fought and threatened liberties guaranteed by the Constitution. Constitutional concerns were at the heart of the impeachment proceedings and the legislation that ensued.

The arguments of the managers against untrammeled powers of summary contempt reflect concerns that persevere to this day: the lack of ordinary due process with the concentration of all powers in

the judge; the absence of any clear standard; dependence on the temperament of the judge. As expressed by Buchanan: "the dearest rights of a citizen may be taken away without trial by jury, and by the sole authority of an angry, offended, and therefore partial judge." Stanbury, op. cit., at 445-46. The managers recognized the "plea of necessity," the right of a court to preserve its own functioning; but, as stated by M'Duffie, this plea must be "pleaded in good faith, and clearly made out. It must be a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed." Id., at 87. The managers were unanimous that this was a constitutional minimum.

4. Actual Obstruction as the Sine Qua Non for Constitutional Exercise of the Contempt Power

Seventy years ago, in Ex parte Hudgings, 249 U.S. 378 (1919), this Court, in overturning the contempt conviction of a witness for perjury, enunciated the principles that set constitutional boundaries to the contempt power. It held that the existence of this power expressed no purpose to exempt judicial authority from constitutional limitations, since "its great and only purpose" is to secure judicial authority from obstruction to the performance of its duties:

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.

249 U.S. at 383.

In a number of later cases this Court has plainly read the statutory requirement

of actual obstruction as a constitutional limitation deriving from the Peck trial. Nye v. United States, supra; In re Michael, 326 U.S. 224, 227 (1945); Cammer v. United States, 350 U.S. 399, 406 (1956). In Bridges v. California, 314 U.S. 252 (1941), this Court struck down, as violative of the First Amendment, the power of a judge to punish publications as contempts on a finding of "a mere tendency" to interfere with the orderly administration of justice in a pending case. Reviewing the "celebrated case of Judge Peck," the Court concluded:

> But we do find in the enactment [of the Act of 1831] viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

314 U.S. at 267.

Bridges demonstrates that the limi-

tation of the contempt power to actual obstruction serves to protect, among other rights, the First Amendment right of free expression which, under the Fourteenth Amendment, binds the states. In In re Oliver, 333 U.S. 257, 275 (1948), this Court reversed a Michigan contempt conviction for failure to meet due process safeguards, stating that the narrow exception to such due process requirements includes only charges of misconduct, in open court in the presence of the judge, which disturbs the court's business and where "immediate punishment is essential to prevent 'demoralization of the court's authority . .. before the public.'"

In a multitude of cases this Court has shown its continuing sensitivity to the potential for abuse which resides in the summary power of contempt. The vulnerability of the judge is a frequent theme.

In Bloom v. Illinois, 391 U.S. 194, 202 (1968), which extended the constitutional guarantees of jury trial to state prosecutions for serious criminal contempts, this Court commented:

> Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament.

Again, in Offutt v. United States, 348 U.S. 11, 13 (1954), remanding a contempt conviction for a second hearing by another judge because the trial judge had become personally embroiled with counsel for the defendant, this Court said:

> The power thus entrusted to the judge [to punish without the formalities required by the Bill of Rights] is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges are human, and may, in a human way, quite unwittingly identify offense to self with obstruction of law.

Cf. Brown v. United States, 356 U.S. 148, 153 (1958), where this Court warned trial

judges against "confusing offense to their sensibilities with obstruction to the administration of justice."

5. Constitutional Limitations in Lawyer Contempts

The danger of confusing perceived offense with actual obstruction looms large when confrontations arise between judge and lawyer over disagreement on the judge's rulings. Here not only First Amendment and due process considerations come into play, but also the need to give uninhibited effect to the Sixth Amendment right of a criminal defendant to assistance of counsel. In such situations this Court has required a clear showing of actual obstruction of justice. In re McConnell, 370 U.S. 230 (1962). The lawyer in this case, after being instructed by the judge in the presence of the jury to refrain from repeatedly asking ques-

tions on certain subjects which the court had ruled were not admissible, persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us." After a short recess requested by his co-counsel, the lawyer did not continue to ask the forbidden questions. In reversing his conviction for contempt, this Court said:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

370 U.S. at 236. Cf. Holt v. Virginia, 381 U.S. 131 (1965) (reversing on Sixth Amendment grounds the conviction of a lawyer for using "vile, contemptuous or insulting language" in violation of the Virginia contempt state; In re Little, 404

U.S. 553, 555 (1972) (pro se criminal defendant in state court "clearly entitled to as much latitude in conducting his defense" as enjoyed by counsel vigorously espousing a client's cause).

The New Jersey contempt statute, as interpreted by the Supreme Court of New Jersey, makes punishable by summary contempt conduct which merely has "the capacity" to obstruct the administration of justice. The statute does not require a clear showing of actual obstruction, nor did the New Jersey court find that petitioner had actually, or imminently threatened, such an obstruction. Mr. Daniel's case displays many of the features catalogued by Buchanan and his confreres as leading to dangerous oppression when the contempt power is untrammeled: a lawyer unable to mask his involuntary feeling that the judge's ruling was absurd, "in-

decorous gestures," the susceptibility of the judge, the offended judge as sole arbiter of the offense imposing punishment before "his resentment should have time to cool," even to the judge's construing the lawyer's denial of any disrespectful intent as "disingenuous." See, Pet. App. at 97a. A judge may not constitutionally be permitted to "carry the standard in his own breast."

We respectfully suggest that this petition presents an exceptional opportunity for the Court to reassert the constitutional limitations on the exercise of the summary contempt power and thereby provide much needed guidance both to the federal courts and the courts of the fifty states. We suggest, also, that the Court likewise agree to hear the petitioner in Lawrence Hochheiser v. United States, Docket No. 89-1991, which presents similar issues of

lawyer contempt, and that it consider the two petitions jointly.

CONCLUSION

For the reasons stated, we respectfully urge that the petition be granted.

Respectfully submitted,

*MORTON STAVIS
MAHLON F. PERKINS, JR.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York NY 10012
(212) 614-6425
ATTORNEYS FOR AMICUS CURIAE

*Counsel of Record